IN THE

Supreme Court of the United States

October Term, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner

v.

ELMORE & STAHL, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of The State of Texas

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CITATIONS

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent, Elmore & Stahl, says that a writ of certiorari should be denied because: First, the State Court decision is not in conflict with a recent decision by the Court of Appeals for the Fifth Circuit; Second, the decision of the Supreme Court of Texas was decided in accordance with all of the applicable decisions of this Court.

STATEMENT

In response to special issues submitted by the court a Cameron County, Texas, jury found that the melons were

in good condition at the time respondent delivered them to the carrier at origin and in a damaged condition at destination. Petitioner had pled and offered evidence to the effect that the damage was due to an inherent vice existing in the melons when received and also due to the act or default of the shipper. The jury found that the damage was not due solely to an inherent vice nor to an act or default of the shipper. *Missouri Pacific Railroad Co. v. Elmore & Stahl*, 360 S.W. 2d 839, 841.

In a non-jury case, the trial judge in *Trautmann Bros. Co. v. Missouri Pacific RR Co.*, 312 F. 2d 102, found that the damage at destination was due to an inherent vice in the melons at origin and to the act of the shipper in failing to replenish the ice in the car prior to its departure.

Petitioner does not agree with the latter statement. Petitioner's Brief, footnote p. 8. The District Court's conclusions of law in the *Trautmann Bros.* case are set out in the Appendix of petitioner's brief at p. 30a. The Court's findings of fact are set forth in Appendix to this brief, p. 5, infra.

ARGUMENT

No conflict exists between the decision of the Court below and the decision in the *Trautmann Bros.* case. In the instant case had the jury found that the damaged condition was due to inherent vice or fault of shipper, the lower Court would have properly entered a judgment for the defendant carrier. In affirming, the Supreme Court of Texas did not decide a federal question in conflict with the Fifth Circuit but, on the contrary, based its decision solely on Federal Court cases.

The Court of Appeals for the Fifth Circuit in a suit brought to recover for damages to interstate shipments of tomatoes, *Thompson v. James G. McCarrick Co., Inc.*, 205 F. 2d 897 (1953) stated:

> "In an action brought under the Carmack Amendment, 49 U.S.C.A. Section 20 (11), all the shipper and holder of a bill of lading is required to do to establish a prima facie case is to show delivery in good condition, arrival in damaged condition, and the amount of his damages whereupon the burden shifts to the carrier to show the cause of damage and that it is not liable therefor."

Neither the opinion of the State Court nor the cases of this Court cited by both the Court of Civil Appeals and the Supreme Court of Texas impose upon interstate carriers an unreasonable degree of responsibility.

The Interstate Commerce Commission in 1918 prescribed the present form for bills of lading. Cf. 52 ICC Rep. 671, December, 1918-April, 1919. The opinion sets out the various statutes passed by Congress to prevent abuses, stating (p. 672) that the carrier is now regarded as an insurer. The Commission (p. 740) declined to prescribe a special form for perishable produce, believing "that the uniform bills prescribed will be adequate to care for any peculiar requirements for such traffic."

Petitioner's contention, if upheld, would hold a common carrier of perishable commodities to the same or even a lesser degree of responsibility than that of a warehouseman or a private carrier. *Southern Ry. Co. v. Prescott*, 240 U.S. 632, *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August, 1963.

APPENDIX

A. Findings of Fact of the District Court in *Trautmann Bros. Co. v. Missouri Pacific Railroad Company.*

"THE COURT:

* * * I am talking now and giving my decision. * * * I am telling you what I think the evidence shows. Mr. Delgallado didn't help me any because he didn't tell me, "I called him and told him that on this car 5976 the ice was this low, and they told me not to put any in." If that evidence was in here, I would then charge the railroad with the responsibility of going out there and finding out why that ice was low. Then it became their duty to impose this tariff, by law, on Trautmann. You all be careful in the future, because this business of coming in here and telling me that you didn't know—there is no evidence here that you know, but if I know that any railroad agent knows what is going on and that that car leaves there without the proper amount of ice, I am going to hold the railroad responsible and negligent, see. But I don't have that evidence here before me. The evidence here before me is that they ordered this car out there. And the evidence before me is that Mr. Fillpot[1] still had work to do on that car. He even opened it sometimes, and if it needed more gas, he gassed it there at the ice dock, and then he connected the fans, and all that. So I think that the whole trouble here has been that Mr. Fillpot was involved in this thing. It is too bad that he couldn't do the job he was supposed to do at the Trautmann shed. Then when everything was pre-cooled, and everything else, turned the car over to the railroad. "here it is." So I think he is the nigger in the woodpile.

[1] Mr. Fillpot was an employee of Trautmann Brothers.

These are my findings, gentlemen, findings of fact, first. I find, from the evidence before me, that the temperature of keeping honeydew melons refrigerated for transportation is from 45 to 50 degrees, as shown by the Department of Agriculture publication. I find that all of the cars reached their destination in Philadelphia within that range, both in top and bottom temperatures. There being no evidence before me that these temperatures changed anywhere down the line during the transportation, I have to assume that they were kept under that type of refrigeration.

I find that the railroad complied with its duty to ice these cars at the regular icing stations. I find that the railroad cars involved here left Laredo with the bunkers not full, but I also find that that was because the shipper, or the plaintiff in this case, had people working in the car, pre-cooling this car, without a proper notification or knowledge on the part of the railroad that such was the case; and that, therefore, the railroad had no duty to either inspect the car or to re-ice it before it departed the point of origin, which was Laredo, Texas.

I further find that the evidence here shows that the production of honeydew melons in the Laredo area, for sale and for picking during the months of August and September of 1957, was a new venture, and that it has not been continued since. I find that out of 52 shipments made over the Missouri Pacific Lines, of Laredo melons, that 49 claims have been filed for decay and overripeness. I therefore find that the melons that were grown in the Laredo area during the season involved here, 1957, had inherent vice in them. I find, therefore, as a matter of law, that the shipper has not discharged its burden of

proof. I find that the railroad has exonerated itself, as a matter of law, of any negligence and of any failure to comply with the instructions of the shipper; and on those phases of the movement that the shipper did not give instructions, that they have proven that they were not negligent.

I find that the decay and overripeness or the bad condition of the melons on arrival in Philadelphia, which was then different from the condition they were in at the point of origin, was due to an inherent vice in the melons themselves." Transcript of Record—Volume III, p. 695-698.

ADDITIONAL FINDINGS OF FACT

XIII.

Fillpot operated the car fans for a period of about eight hours. This was without authority from or knowledge of the defendant, but was under authority from and with the knowledge of plaintiff and its employees having charge of these shipments.

XIV.

Had Fillpot not operated the car fans with the auxiliary motors, the rate of the ice meltage would not made it desirable or necessary that the ice in the bunkers of the cars be replenished before the cars departed Laredo, but with the increased rate of ice meltage resulting from Fillpot's operation of the car fans, it was desirable that the ice in the bunkers be replenished before the cars were switched from the ice dock.

XV.

If the defendant had known that the car fans were operated as above detailed by Fillpot, it would have communicated with the plaintiff and advised it that plaintiff should either re-ice the cars or should pay the defendant an additional charge to cover the increased ice meltage and in either event to put on the bill of lading an appropriate notation of which of the actions was to be taken.

XVI.

If the defendant had known of the cooling operations of Fillpot and that plaintiff had not replenished the ice in the bunkers, defendant would have re-iced the cars before switching them from the ice company's dock. Transcript of Record, Volume III, pg. 723-724.